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IN THE

Supreme Court of the United States

October Term, 1958

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.
No. 9

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

UNITED STATES PLYWOOD CORPORATION,
Petitioner,
vs.
CITY OF ALGOMA,
Respondent.
No. 44

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF AMICI CURIAE

of
BRUCE BROMLEY
ROSWELL MAGILL,
15 Broad Street,
New York 5, N. Y.

CRAVATH, SWAINE & MOORE,
15 Broad Street,
New York 5, N. Y.
Of Counsel.

September 15, 1958.

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UNITED STATES PLYWOOD CORPORATION, *Petitioner,* *vs.* CITY OF ALGOMA, *Respondent.* ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN	No. 44

Brief Amici Curiae of Bruce Bromley and Roswell Magill

The Issue in the Above-entitled Cases

The underlying issue in the two cases now before this Court is whether exclusive jurisdiction to tax raw materials that are imported by American industry for use in manufacture is vested in the Congress under Article I, Section 10, Clause 2 of the Constitution (hereinafter sometimes referred to as the "Import-Export Clause"), which provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The exclusive jurisdiction of the Congress over taxation of imports must, of course, be reconciled with the jurisdiction of the states to levy taxes upon property within their respective boundaries. At some point of time, imported raw materials lose their status as "imports" within the meaning of the above-quoted language of the Constitution and become subject to state taxation.

The precise issue presented in the two cases now before this Court is: at what point of time do raw materials imported by American industry for use in manufacture lose their status as imports so as to be subject, without the consent of the Congress, to taxation by the states?

In Case No. 9, the Ohio Supreme Court held that iron ores imported from foreign countries by a domestic steel

company for use in the manufacture of iron and steel products and held in its storage yard, in the same form in which imported, awaiting transfer to its manufacturing facilities were subject to a general *ad valorem* property tax of the state. In Case No. 44, the Wisconsin Supreme Court held that veneers imported by a domestic plywood company and held in its warehouse, in the original packages in which imported, awaiting transfer to its factory were subject to a general *ad valorem* property tax of the state. The two state Supreme Courts, by quite different lines of reasoning, arrived at decisions which are unwarranted departures from the rule long established by this Court and generally accepted by the states, and each of such decisions, if affirmed, would mean, in effect, that the exclusive jurisdiction of the Congress to control the taxation of imports, as provided by the Import-Export Clause, does not apply to imported raw materials.*

Interest of the Amici Curiae

The underlying issue in the two cases now before this Court is of great general interest. Raw materials from abroad are vital to our national economy and it continues to be as important today as it was in 1787 that exclusive jurisdiction to tax imports be vested in the Federal Government. Although the two state Supreme Courts followed

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*This brief does not relate in any way to (i) that portion of Case No. 9 which involves the constitutionality of the Ohio statute under the "equal protection clause" of the Constitution (Section 1 of the Fourteenth Amendment) or (ii) that portion of Case No. 44 which involves the holding by the Wisconsin Supreme Court that a portion of the inventory in that case (the raw lumber) had already been subjected to a manufacturing process by being stacked for air drying.

different lines of reasoning in sustaining the state taxation in their respective cases, the two cases cannot be considered as presenting different problems; rather they should be regarded as presenting different approaches to the same underlying issue which this Court must settle at this time.

This brief is filed by the undersigned, with the written consent of all parties to the cases, in order to present to this Court the reasons why we think that the decisions of the Ohio Supreme Court and the Wisconsin Supreme Court, in so far as they relate to the issue stated above, should not be allowed to stand.

A number of clients of the law firm of which the undersigned are members import raw materials for use in the manufacture of their products and are necessarily interested in the final resolution by this Court of the issue presented in the two above-entitled cases.

Summary of Argument

1. Each of the cases before this Court involves the attempt by a state to impose a tax on imports that was declared to be unconstitutional by this Court in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945). These cases afford an opportunity for this Court to reaffirm the current vitality and the wisdom of the constitutional principle that taxation of imports is the exclusive concern of the national Government.

2. Under the rule first laid down by this Court in *Brown* v. *Maryland*, 12 Wheat. 419 (U. S. 1827), the thing imported, while remaining the property of the importer, in his warehouse, in the original form or package in which

it was imported, is not subject to state taxation. This Court has reaffirmed that rule many times, most recently in its decision in the *Hooven* case, *supra*.

3. The intent and purpose of the Import-Export Clause of the Constitution precludes any distinction between its application to raw materials imported "in packages" and its application to raw materials imported "in bulk", or between goods imported by a merchant for sale and goods imported by a manufacturer for use; nor is any such distinction indicated by the decisions of this Court or by the decisions of the state courts generally.

4. In an effort to evade the effect of this Court's decision in the *Hooven* case, the Ohio Supreme Court and the Wisconsin Supreme Court have relied on various asserted distinctions, none of which can stand analysis, and all of which are, in fact, only designed to permit the states to encroach, particularly in the case of raw materials imported for use by an importer, upon the exclusive jurisdiction of the Congress, under the Import-Export Clause, to decide whether and how imports shall be taxed.

5. This Court's decision in the *Hooven* case is dispositive of the issue stated above which is presented in the two cases now before this Court.*

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*See footnote, page 3, *supra*.

ARGUMENT

I.

THE MATERIAL FACTS AND THE ISSUES IN EACH OF THE CASES BEFORE THIS COURT ARE THE SAME AS THOSE IN *HOOVEN & ALLISON CO.* v. *EVATT*, AND JUST AS THE TAX IN THAT CASE WAS UNCONSTITUTIONAL, SO THE TAXES NOW SOUGHT TO BE SUSTAINED ARE UNCONSTITUTIONAL.

In *Hooven & Allison Co.* v. *Evatt, supra,* Chief Justice Stone, speaking for the majority of this Court, struck down as unconstitutional the Ohio *ad valorem* personal property tax as applied to imported raw materials held in storage by the importer for use in its manufacturing process.*

In the *Hooven* case, the raw materials were hemp, jute, sisal and other raw fibers imported from the Philippine Islands and other foreign countries. In Case No. 9, the raw materials are iron ores imported from five different foreign countries. (Case No. 9, R. 34) In Case No. 44, the raw materials are veneers imported from three different foreign countries. (Case No. 44, R. 30)

In the *Hooven* case, the raw fibers were stored by the importer in its warehouse awaiting its use of them in the manufacture of rope products. In Case No. 9, the iron ores were stored in the importer's storage yard awaiting transfer to ore stock bins and stock houses in its plant for ultimate use in the manufacture of iron and steel. (Case No. 9, R. 35) In Case No. 44, the veneers were stored in the warehouse of the plywood company, the importer, awaiting transfer to its factory for use in the production of veneered wood products. (Case No. 44, R. 31)

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*That Ohio tax was the same Ohio tax the application of which to raw materials imported by a steel company for use in its manufacturing process has been sustained by the Supreme Court of Ohio in Case No. 9.

In each case, the raw materials (fibers, ores, veneers) remained in the form in which imported.

The legally material facts in the present cases cannot be distinguished from the facts in the *Hooven* case. The factual difference—that in these cases iron ores or veneers are sought to be taxed, while in the *Hooven* case raw fibers were sought to be taxed—is not material.

As shown in Point IV below, the Ohio Supreme Court and the Wisconsin Supreme Court have each attempted to shift the footing on which it would uphold a tax on imported raw materials. But the basic facts and the issues in these cases and those in the *Hooven* case are the same. These cases are the *Hooven* case all over again. Just as the tax on the imported raw fibers in *Hooven* was unconstitutional, so is the tax on imported iron ores in Case No. 9, and the tax on the imported veneers in Case No. 44, unconstitutional.

Chief Justice Stone expressly recognized that the Import-Export Clause was intended to confer upon the national Government the exclusive power to determine when and how imports should be taxed. 324 U. S. at 656. It is just as important today as it was at the time when the Constitution was adopted that the states should not be permitted to encroach upon Federal authority in this field. As the President noted in his 1958 State of the Union Message to the Congress, world trade supports a significant segment of American industry and agriculture, providing employment for four and a half million American workers, supplying our ever-increasing demand for raw materials, and providing the opportunity for American free enterprise to develop on a world-wide scale.*

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*See 104 Cong. Rec. 174 (January 9, 1958). The President concluded the portion of this Message dealing with world trade with the following statement:

> "America is today the world's greatest trading nation. If we use this great asset wisely to meet the expanding demands of the world, we shall not only provide future opportunities

The Randall Commission on Foreign Economic Policy, in the chapter of its Report entitled "United States Dependence on Imported Materials",* notes that this nation depends upon foreign sources for over 30% of its requirements of copper, lead and zinc; over 50% of its requirements of tungsten, bauxite and antimony; over 75% of its requirements of chrome and manganese; practically all of its nickel requirements; and all its requirements of tin, natural rubber and jute. In addition, each year its requirements of crude oil, iron ores, uranium ores, coffee, cocoa, and many other basic raw materials and commodities are supplied to an increasing extent from foreign sources.

In his Message to Congress on the 1958 budget, the President stated:**

> "We live in a world of economic, no less than political, interdependence. As the greatest producer, consumer, and exporter in the world, the United States must be a dependable market for foreign goods if mutually beneficial trade is to grow and prosper. The Reciprocal Trade Agreements Act should be extended for 5 years beyond its expiration date of June 30, 1958, with certain new authority for the President to negotiate gradual and selective tariff reductions. Legislation should also be enacted to authorize United States membership in the Organization for Trade Cooperation to improve the administrative efficiency of our trade agreements with other countries."

The ability to control taxes on imported goods, and thereby to encourage or to discourage the importation of par-

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for our own business, agriculture, and labor, but in the process strengthen our security posture and other prospects for a prosperous, harmonious world."

*See Commission on Foreign Economic Policy, Report to the President and the Congress, H. R. Doc. No. 290, 83rd Cong., 2d Sess. 39-40 (January, 1954).

**104 Cong. Rec. 337 (January 13, 1958).

ticular kinds of goods, or goods from particular sources, is today an important factor in the field of United States foreign policy.

It is too clear to require any argument that the taxation of imports, affecting as it does the relations of this country with other countries, is a matter which requires a single authority and uniformity of policy. It is too much to expect that such uniformity could be attained if the authority were in the hands of 48 states rather than exclusively in the national Government. This Court will take notice that, over the years, the interests of the several states with respect to foreign trade, tariffs, free trade and similar matters have been diverse. It is not only possible but extremely likely that there would be great variances between the policies pursued by the several states and direct conflict between the policies pursued by some of them and the policies which the national Government desired to follow. If the decisions in the Ohio and Wisconsin cases now before this Court are allowed to stand, the formulation of a uniform national policy would be impossible.

The constitutional immunity of imports from state taxation, which results in exclusive national Government control in this field, is by no means "an echo from an era that is past." It is vitally important today that the raw materials which we must now import to sustain our domestic production shall not, without the consent of the Congress, be subjected to state taxes, while they remain imports and before they are used in manufacture.

II.

FOR MORE THAN 130 YEARS THIS COURT HAS ADHERED TO THE RULE THAT THE THING IMPORTED, WHILE REMAINING THE PROPERTY OF THE IMPORTER, IN HIS WAREHOUSE, IN THE ORIGINAL FORM OR PACKAGE IN WHICH IT WAS IMPORTED, IS NOT SUBJECT TO STATE TAXATION.

In *Brown* v. *Maryland*, Chief Justice Marshall carefully reviewed the scope and purposes of the Import-Export Clause of the Constitution. From that decision to the present day, the analysis made by the Chief Justice and the rule formulated by him have been followed by this Court in all cases involving the assertion by a state of the right, without the consent of Congress, to levy a tax on imports.

The Approach.

The first step in Chief Justice Marshall's analysis was to determine the meaning of the word "imports" as used in the Import-Export Clause of the Constitution. He found that a duty on "imports" included not only a tax on the act of importation, but also a tax on "the thing imported". Recognizing that the constitutional prohibition was not intended to protect imported goods indefinitely from the state taxing power, the Chief Justice concluded that "there must be a point of time when the prohibition ceases, and the power of the state to tax commences". 12 Wheat. at 441. It is this "point of time" which must be determined in every case.

In the *Hooven* case, Chief Justice Stone reaffirmed, as had many of those speaking for this Court before him, Chief Justice Marshall's approach to the problem, by stating that

there is a

> ". . . constitutional necessity that the immunity [from state taxation], if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until *a point is reached, capable of practical determination,* when it can fairly be said that it has become a part of the mass of taxable property within a state. . . ." (324 U. S. at 667) (Italics added)

The Rule.

Chief Justice Marshall's rule for fixing the "point of time" capable of practical determination at which imported goods become subject to the taxing power of states has been repeated in every case heretofore decided by this Court which has considered the problem. And in every such case, that rule has served as the cornerstone for decision.

In holding the Maryland levy to be a prohibited tax on imports, Chief Justice Marshall said:

> ". . . It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution." (12 Wheat. at 441-42)

Many of the leading justices who have sat on this Court have given express approval to the rule laid down by Chief Justice Marshall.

Chief Justice Taney (who argued for the State of Maryland in *Brown* v. *Maryland*), after what he called

"further and more mature reflection", expressed approval of Marshall's views in these words:

> ". . . Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government: . . ." *License Cases*, 5 How. 504, 575 (U. S. 1847)

In *Low* v. *Austin*, 13 Wall. 29 (U. S. 1871), Mr. Justice Field gave full approval to the statements of Marshall and Taney.

Mr. Justice (later Chief Justice) White, in contrasting the *absolute* constitutional prohibition against state taxation of imports, with the *implied* constitutional prohibition of state taxation which constitutes a burden upon interstate commerce,* stated the *Brown* v. *Maryland* rule approvingly:

> ". . . Thus, in *Brown* v. *Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such." *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 521 (1904)

In *Gulf Fisheries Co.* v. *MacInerney*, 276 U. S. 124 (1928), Mr. Justice Brandeis applied Chief Justice Marshall's reasoning to the facts of that case and determined that certain bulk imports (raw fish) had been processed prior to

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*The attempts to levy state taxes on imports in the two cases before this Court do not involve the problem of what constitutes an undue burden on interstate commerce. Therefore, this brief does not discuss the relatively large number of cases (such as *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506 (1923)) which have carefully distinguished the constitutional problems in the field of state taxation which arise under the Commerce Clause from such of those problems as arise under the Import-Export Clause.

imposition of the tax and so were no longer "imports" within the constitutional prohibition. It is apparent from Mr. Justice Brandeis' opinion that he would not have regarded the mere storage of the fish, without processing, as justifying the imposition of the tax.

And, of course, in the *Hooven* case, Chief Justice Stone set forth the above-quoted language of both Marshall and Taney, and restated at length, and followed, the rule each advocated.

No decision of this Court can be interpreted to sustain the attempt by a state to tax raw materials imported by a manufacturer and held in storage by him in the same form or package in which imported.

III.

THE IMPORT-EXPORT CLAUSE OF THE CONSTITUTION APPLIES WITHOUT DISTINCTION TO ALL IMPORTS, WHETHER "IN PACKAGES" OR "IN BULK" AND WHETHER FOR SALE OR FOR USE.

The term "imports" as used in the Import-Export Clause obviously is not restricted to any particular kind or classification of goods. It embraces all goods brought into the United States from foreign countries. There is no basis either in reason or in authority for any differences in the application of the Import-Export Clause, depending upon whether the goods are imported "in packages" or "in bulk", or whether for sale or for use by the importer. In all cases, the Federal Government has the exclusive jurisdiction to tax the import and the states have no authority, without the consent of the Congress, to do so.

In the two cases now before this Court, the issue is raised in Case No. 9 as to raw materials imported in bulk for use by the importer and in Case No. 44 as to raw materials imported in packages for use by the importer. In

another case, the goods, whether in packages or in bulk, may have been imported for sale by the importer.

The question, in each case, is when do the goods or raw materials which are brought into the United States cease to be imports?

Brown v. *Maryland* establishes that an import does not cease to be an import simply because it has been delivered to its destination. Something more must happen. In the case of goods in a package that something more is the sale of the package or the opening of the package. In the case of raw materials imported in bulk, since there is no package, the putting to use or the selling of the raw materials marks the point of time at which import status ceases.

As to a possible distinction between goods imported for sale and goods imported for use.

In the *Hooven* case, this Court was divided on the question whether a distinction between goods imported for sale and goods imported for use was justified. Chief Justice Stone speaking for the majority said:

> ". . . We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale." (324 U. S. at 667)

In almost the same words, the Supreme Court of the State of Washington, in a case involving an attempt by that State to tax cocoa beans imported by a chocolate company and stored in its warehouse pending use in the manufacture of chocolate, had held that the Import-Export Clause of the Constitution applied in the case of goods imported for use as well as in the case of goods imported for sale, saying:

> ". . . We find no reason or authority for distinguishing between imports intended for sale and

those intended for use by the importer in some manufacturing process." *Washington Chocolate Co.* v. *King County*, 21 Wash. 2d 630, 652, 152 P. 2d 981, 992 (1944)

In the *Hooven* case, Chief Justice Stone stated the rule applicable to goods imported for use as follows:

". . . the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since *Brown* v. *Maryland, supra,* an import is deemed to retain its character as such 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported,' see *Brown* v. *Maryland, supra,* 442, or until put to the use for which it was imported. Chief Justice Marshall, in *Brown* v. *Maryland, supra,* pp. 442-443, rejected the suggestion that 'an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.' Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end. *It is quite another matter to say, and Chief Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported.* . . ."

". . . .

"This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation *when they are subjected to the manufacture for which they were imported,* *May* v. *New Orleans, supra,* 501; *Gulf Fisheries Co.* v. *MacInerney, supra,* 126; *McGoldrick* v. *Gulf Oil Corp., supra,* 423, *or* when the original packages in which they were imported are broken, *Low* v. *Austin, supra,*

34; *May* v. *New-Orleans, supra,* 508-509. . . ." (324 U. S. at 665-66) (Italics added)

As to a possible distinction between goods imported in packages and goods imported in bulk.

Although the rule of *Brown* v. *Maryland* is sometimes referred to as the "original package" rule, Chief Justice Marshall's phrase *"the original form or package in which it was imported"* has been repeated in every subsequent decision by this Court dealing with the subject. And the clear indication in this Court's opinions and the state court decisions generally are to the effect that the rule of *Brown* v. *Maryland,* as affirmed in the *Hooven* case, applies to goods imported in bulk, as well as to goods imported in packages.

Four cases have dealt with imported crude oil. In three of those cases the courts held that the constitutional immunity from state taxation was applicable to the crude oil although it was not packaged. The attempts to have the courts treat the ship as "the original package" failed. The immunity survived the pumping of the oil from the ship into storage tanks on shore. *Mexican Petroleum Corp.* v. *Borough of Roosevelt,* Case No. 209, (Sup. Ct. N. J., Oct. 14, 1919) (a copy of the decision, which is unreported, is annexed as Appendix A); *Galveston* v. *Mexican Petroleum Corp.,* 15 F. 2d 208 (S. D. Tex., 1926); *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La. 604, 138 So. 117 (1931).

In the earliest of those decisions, the *Borough of Roosevelt* case, the court, with homely simplicity, said:

> ". . . It is conceded that if this oil was imported in barrels or other packages, it would not be taxable so long as the packages remained unbroken, or disposed of in such packages. We are unable to see how it can be said that the importation has lost its character simply because it is pumped into retain-

ing tanks in this state, for so long as it remains there it is not mingled with the mass of other property. If this be not so, then the character of the retainer would permit the imposition of taxes in violation of the Federal Constitution." (See p. 34, *infra*)

In the most recent of those decisions, the *Louisiana Tax Commission* case, the court said with reference to Louisiana's power to tax imported crude oil held in on-shore storage tanks as follows:

> "... Our appreciation of Brown v. Maryland, and the authorities, cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practicable way of importing it is in bulk. . . ." (173 La. at 614, 138 So. at 120)

The fourth case involving imported crude oil, *Mexican Petroleum Corp.* v. *City of South Portland*, 121 Me. 128, 115 Atl. 900 (1922), held that the imported crude oil became subject to the state taxing power the instant it was unloaded from the oil tankers and pumped into on-shore storage tanks. This decision was expressly disapproved by the court in the *Louisiana Tax Commission* case. It was also considered and its reasoning rejected by this Court in *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414 (1940). In the latter case, the City of New York suggested that removal of imported crude oil from a ship might constitute the breaking of an original package, citing the

City of South Portland case. (Brief for Petitioner upon Reargument, p. 18) In his opinion, speaking for a unanimous Court, Mr. Justice Stone said:

> "For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, *upon its manufacture*, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation." (309 U. S. at 423) (Italics added)

The decision in the *City of South Portland* case must be regarded as wrong, but unappealed.* It is in direct conflict with the analysis and rule laid down by this Court. Its only merit is to illustrate the power which, but for the Import-Export Clause of the Constitution, the seaboard states would have to tax imports to the prejudice of the interior states.

In *Re Taxes Pacific Guano & Fertilizer Co.*, 32 Hawaii 431 (1932), Hawaii sought to tax phosphate rock, imported in bulk and held in storage by the importer. The court held that, so long as the raw materials remained in their "original form" in the ownership and the warehouse of the importer, they retained their distinctive status as imports and remained immune from local taxation.

In an opinion relating to ilmenite ore imported from India, the Maryland Attorney General has ruled that

> ". . . The fact that an imported material may be of such character as not to be susceptible to packaging does not destroy the [constitutional] immunity as long as it is not sold or appropriated to the use for which it is designed by the importer. In other words, if the material imported remains in the condition in which it was brought in, the immunity continues

*Reasoning similar to that of the *City of South Portland* case was used by a California District Court of Appeal in *E. J. Stanton & Sons* v. *County of Los Angeles*, 78 Cal. App. 2d 181, 177 P. 2d 804, *cert. denied*, 332 U. S. 766 (1947).

to attach." 30 Ops. Atty. Gen. (Md.) 220, 221 (1945).

In applying the established rule to the imported iron ores in Case No. 9 and the imported veneers in Case No. 44, it is clear that the goods in each case

(1) "remained the property of the importer";

(2) "remained in the importer's warehouse" (in the case of the ores in an outdoor storage yard, "a structure having two parallel walls" (Case No. 9, R. 34));

(3) in the case of the ores, remained "in the original form" in which imported, and in the case of the veneers, remained in the "original package" in which imported, in each case not mingled with, but clearly segregated from, the "mass of property in the country"; and

(4) had not yet been used in the manufacturing process for which they were imported.

IV.

THE ASSERTED DISTINCTIONS UPON WHICH THE OHIO SUPREME COURT AND THE WISCONSIN SUPREME COURT RELIED IN ATTEMPTING TO DISTINGUISH THE FACTS IN THE CASES NOW BEFORE THIS COURT FROM THE FACTS IN THE *HOOVEN* CASE DO NOT STAND ANALYSIS.

It seems clear, as stated earlier, that the decisions of the Ohio Supreme Court and the Wisconsin Supreme Court now before this Court for review represent attempts to sustain state taxes that are on all fours with the tax declared to be unconstitutional by this Court in the *Hooven* case. Goods, particularly raw materials, imported by American industry for use do, indeed, represent an impor-

tant part of our total imports, and, from the point of view of the individual state taxing authority, the sooner such goods can be subjected to local taxation the better. But that conflict between the local interest and the national viewpoint, which was the occasion for the inclusion of the Import-Export Clause in the Constitution, has always existed and highlights the necessity for the exclusive jurisdiction of the Federal Government over taxation of imports.

Neither the Ohio Supreme Court nor the Wisconsin Supreme Court purported to rule in direct conflict with this Court's decision in the *Hooven* case. Each rested its decision, however, on grounds which, if allowed to stand, would, as a practical matter, mean the end of exclusive Federal jurisdiction to tax imported raw materials prior to their use or sale.

The Ohio Decision

In concluding that the imported iron ores in the steel company's storage yard were subject to the Ohio tax, the Ohio Supreme Court sustained the order of the Tax Commissioner which had, in effect, dismissed the *Hooven* case by limiting its application to imports in "original packages". (Case No. 9, R. 5-8) The Ohio Board of Tax Appeals, which reversed the Commissioner's order, noted that one advantage of the "newly conceived theory" advanced by the Commissioner was that it "would permit state taxation of that which the constitutional provision prescribes shall not be taxed." (Case No. 9, R. 22)

The Ohio Supreme Court did not, of course, expressly presume to restrict this Court's decision in *Hooven*. It could hardly have done so because it was its own opinion holding that the Import-Export Clause of the Constitution did not grant immunity from state taxation in the case of imports for use that was overruled by this Court in *Hooven*. Rather, the Ohio Supreme Court attempted to mask the basic reas-

sertion of its original holding and to draw a herring across the trail, by two arguments *viz.*: that the imported ores in the storage yard were no longer "imports" because (1) shipments of iron ore had been added by the steel company to its stockpiles of prior shipments of the same grade of ore imported from the same place, and (2) portions of the ore previously in storage had been removed to stock bins and stock houses in the steel company's plant for use in manufacturing.

But it is clear that by grounding its decision on the facts that (1) identical imported ores were added to existing stockpiles of ores imported from the same sources, and (2) some withdrawals from existing stockpiles for transfer to the plant had previously occurred, the Ohio court, in effect, withdrew from *all* raw materials imported in bulk the immunity from state taxation that the Constitution affords to imports generally. The court might as well have said that the separate lumps of ore constituting a single shipment had been commingled; or that the importer at his peril must use simultaneously all the raw materials in any given shipment which he imports. The facts are that there was no commingling in any individual stockpile with anything other than identical ore imported from the same source (Case No. 9, R. 35); there was no commingling with anything subject to state taxation. The fact that some ore had been withdrawn from storage and transferred to the plant for use did not and could not mean that there had been any use of the ores remaining in the storage yard.

According to the reasoning of the Ohio Supreme Court it would have made a difference if each shipment of a particular grade of ore had been stored in a separate pile and if, when any part of a pile was withdrawn and transferred to the plant for use, the entire pile had been withdrawn and transferred at the same time. Such a procedure, even if feasible, would add nothing to demonstrate that

the ores remaining in the importer's storage yard continued in the same form in which imported and had not been subjected to the manufacturing process. Certainly it would be a silly application of the constitutional provision to make the result turn on the area of the storage yard or the number of square feet of floor space in the warehouse of a particular manufacturer-importer. The rule should not lead to one result in the case of the importer who has a storage yard of sufficient size to permit each shipment of a particular grade of ore to be stockpiled in a separate pile and to another result where the importer is compelled to combine in a single pile successive shipments of identical ores. The Ohio court's decision, if allowed to stand, would, as a practical matter, mean that the Federal jurisdiction to tax imports, when they consist of raw materials imported in bulk, is no longer exclusive.

Neither of the Ohio court's grounds for evading *Hooven* is valid.

Under the cases, the addition of a shipment of raw materials imported in bulk to a stockpile consisting of an earlier shipment of identical raw materials imported in bulk from the same source obviously is not a putting to use of either shipment or a mixing it up "with the mass of property in the country" (*i.e.*, property not having import status).

Also, under the cases, import status ceases only as to that part of the raw materials put to use or sold. The sale of one package or the opening of one package for the purpose of putting to use or selling its contents does not change the status as imports of the other packages stored in the same place. So also the raw materials remaining in stockpile, after a portion of them has been sold or used, retain their status as imports, since they remain in the "original form" in which imported and have not in any way been put to use or otherwise, in the words of Chief Justice Marshall, "become . . . mixed up with the mass of property in the country" or, in the words of Chief Justice

Stone, "become a part of the mass of taxable property within a state".

Even if it be conceded that the iron ores stored in the steel company's storage yard would one day be transferred to the plant for ultimate use in the manufacture of iron and steel products, it remains clear that, so long as they remain in the storage yard, they have not been subjected to the manufacturing process. It is elementary that the status of goods on the tax date is what counts. *Coe* v. *Errol,* 116 U. S. 517 (1886). Where goods were on the day before the tax date or where they may be, or what their status may be, on the day after the tax date is not material. If the iron ores retained their status as imports on the tax date, they may not be taxed by the state, even though it may be expected that at a future date they will be subjected to the manufacturing process and thereby lose their status as imports and become subject to taxation by the state.

The crude oil cases involving attempts by a state to tax oil pumped into on-shore storage tanks illustrate the shallowness of the Ohio court's reasoning. In each of those cases, the crude oil sought to be taxed was pumped by the importer into storage tanks containing previously imported oil of the same grade, and from time to time the oil in the storage tanks was withdrawn by the importer for use or for sale. Nevertheless, with the exception of the aberrational decision in the *City of South Portland* case, the courts have consistently refused to attach any significance to those facts and have declared the attempted tax to be unconstitutional.

As the court said in *Mexican Petroleum Corp.* v. *Louisiana Tax Commission, supra*:

> "... There was no change here in the oil through a process of mixing, for the oil put in each tank was identical in kind and grade with that already in it. Besides, the record justifies the conclusion that the

> oil already in the tanks was oil imported by plaintiff, and still retained its character as an import, and hence there was no mixing of the oil with oil that had become incorporated into the general mass of the property of the country." (173 La. at 616, 138 So. at 121)

In a case involving iron ores, rather than crude oil, the Attorney General of Maryland has considered the status of raw materials imported in bulk and has ruled that

> "So long as ores from different foreign sources are kept in separate stockpiles in the same form and condition in which received, they would, in our opinion, retain their original characteristics as imports." 2 CCH Maryland State Tax Reporter para. 200-152 (Opinion dated December 19, 1956)

See also *Re Taxes Pacific Guano & Fertilizer Co., supra.*

There was no contention in *Low* v. *Austin, supra,* that the cases of French wine were subject to the California tax on the ground that one shipment was warehoused with another shipment or on the ground that from time to time a case of wine may have been withdrawn for sale or use by the importer. There was no contention in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218 (1933), that all the 33 million pounds of nitrate of soda held in storage were subject to the Alabama tax because various shiploads of nitrate had been stored together, or because some bags of nitrate had been removed from storage from time to time for sale by the importer. Nor was there a contention in the *Hoover* case, where imported fibers were from time to time added to the inventory of fibers stored in the warehouses and where some of that inventory was from time to time withdrawn and transferred to the factory for use in manufacture, that all the imported fibers in storage were subject to tax simply because different shipments of identical imported fibers were stored together or because portions of

them were used from time to time in the manufacture of rope products.

We cannot conceive that this Court would have considered seriously any such contention if it had been made by the state taxing authorities in any of those cases.

If the steel company in Case No. 9 had sold portions of its ores, let us say by the ton, it would be clear under *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama* that the sale of such portions of its ores would not make the remaining portions of its inventory any the less imports, or subject such remaining portions to state taxation without the consent of the Congress. If the unreal conditions imposed by the decision of the Ohio Supreme Court, namely, that shipments of like raw materials may not be stored together and that if any part of a shipment is used the entire shipment is deemed to have been used shall prevail, the Import-Export Clause will no longer have any application to imported raw materials. These conditions, as pointed out, add nothing to the practical determination of when a portion of an inventory of imported raw materials in fact becomes "work in process", and, in fact, would necessarily mean the end of the immunity for such imports.

The Wisconsin Decision

In the Wisconsin case, the goods taxed were veneers stored by the importer in his warehouse in the original packages in which imported awaiting use in its manufacturing process. So far as such veneers are concerned the question of raw materials imported in bulk was not present.*

*The case also involved lumber imported in bulk as to which the Wisconsin Supreme Court said "The lumber is not protected from taxation by the original package doctrine, for it was unpackaged . . .", a view quite inconsistent with the great weight of authority. The Wisconsin case also involved the contention, accepted by the Supreme Court of Wisconsin, that the imported lumber had been subjected to a manufacturing process by being air-dried, an issue not discussed in this brief. See footnote on page 3, *supra*.

The tax was assessed on only an arbitrary part (50%) of such veneers, and the tax was sustained by the majority opinion of the Wisconsin Supreme Court, in purported reliance upon Chief Justice Stone's remarks in the *Hooven* case about "Current Operational Needs".

A careful analysis of the Chief Justice's remarks will reveal that the Wisconsin courts distorted his meaning and twisted the phrase "current operational needs" into an unconstitutional umbrella under which Wisconsin may tax imported goods. In order to understand the true thrust of the Chief Justice's comments, it is only necessary to turn to the Record in the *Hooven* case, the brief for the State of Ohio in that case and Mr. Justice Black's dissenting opinion. Each of those sources reveals in its own way, and together they demonstrate conclusively, that the finding of fact by the Wisconsin taxing officials, sustained by the Wisconsin court, that half the imported veneers constituted "current operational needs" is only a transparent expediency to justify the imposition of an unconstitutional tax.

This is what the Chief Justice said:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no

basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (324 U. S. at 667)

Testimony of Mr. Martin before the Ohio Board of Tax Appeals.

Mr. Martin, the general manager of Hooven & Allison Co., when asked how long the imported fibers were kept in the warehouses before they were used, replied:

> "... it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances *and we do not carry any more inventory than we need to;* ... we attempt to run our business with a *minimum working inventory,* of course." (Record, p. 42, *Hooven & Allison Co.* v. *Evatt*) (Italics added)

Mr. Martin was then asked whether the Company made a bookkeeping entry to show that fibers had been removed from the warehouses. He replied that:

> "... each bale of fiber as it is removed from the raw material warehouse becomes, according to our records, in process. Of course we have to batch and treat this stuff; *it may not be used for a couple of days;* but as soon as it leaves the warehouse it is charged in process; the usual procedure in any class of goods, I suppose.
>
> "... If they are taken out of the warehouse they are charged in process ..." (Record, p. 43, *Hooven & Allison Co.* v. *Evatt*) (Italics added)

The testimony reveals that Hooven & Allison Co. carried only a minimum working inventory, no more than it needed to, and that bales of fiber were sometimes not immediately used upon their withdrawal from storage and transfer to the Company's factory.

The brief for the State of Ohio

On the basis of the above-quoted portions of the Record, Ohio's principal argument before this Court in the *Hooven* case was that the raw fibers held in its warehouse by Hooven & Allison Co. had lost their status as imports protected by the Constitution because maintenance of "a minimum working inventory" constituted actual *use* of such fibers. Thus, in its summary of argument, Ohio stated:

> "2. . . . In order to keep its plant in constant operation, it was necessary for the petitioner to keep a 'backlog' or supply of fibers in its warehouses. The petitioner always operated its business 'with a minimum working inventory' and never bought fibers for the purpose of sale. Under these circumstances, it is contended that the petitioner has used the fibers just as truly as if it had broken the original packages and started them through its mills." (Brief for Respondent, pp. 6-7, *Hooven & Allison Co.* v. *Evatt*).

In the light of the Record and the arguments advanced by the State of Ohio, the observation of Chief Justice Stone regarding "current operational needs" becomes clear. First of all he says: "It cannot be said that the fibers were subjected to manufacture when they were placed *in petitioner's warehouse*". This statement is made even though the Record clearly established that all the warehoused fibers together constituted a minimum working inventory. Next the Chief Justice says that it is "unnecessary to decide whether . . . the presence of some fibers *in the factory* . . ," would render those fibers subject to state taxation. Although the company had paid without protest the tax on such of the fibers as had already been transferred to its factory, and thus it was unnecessary for this Court to decide the status of those fibers, it is apparent from the Chief Justice's second sentence that he considered it possible that even fibers in

the factory itself, if in their original packages, might be still immune from state taxation. Finally the Chief Justice says that "the record affords no basis for saying that *any part* of petitioner's fibers, stored in its warehouse were required to meet such immediate current needs", thus rejecting Ohio's argument.

If we apply the foregoing analysis to the facts of Cases No. 9 and No. 44, we find:

As applied to the imported iron ores in Case No. 9, the question would be whether the ores removed from the stockpiles in the storage yard and deposited in the stock bins and stock houses in the steel company's plant became subject to state taxation.

As applied to the imported veneers in Case No. 44, the question would be whether veneers removed from storage in the warehouses and transferred to the plywood company's factory became subject to state taxation prior to use or to breaking of the packages.

Just as in *Hooven*, however, those questions were not put in controversy in the state courts and are not now before this Court.

When the Chief Justice went on to say that the "record affords no basis" for saying that *"any part"* of the *warehoused* fibers were required to meet "immediate current needs", he made the statement on the basis of a Record which stated baldly and without contradiction that "a minimum working inventory" was all that was maintained in storage and in the face of Ohio's argument in its brief that maintenance of such minimum working inventory constituted actual use of the imported goods held in inventory.

Is it not clear that Chief Justice Stone did no more than reject Ohio's argument, which was the interpretation placed upon his remarks by the three dissenting justices of the

Wisconsin Supreme Court?* Is it not also clear that a majority of the Wisconsin court, on the Record that was before this Court in the *Hooven* case, would have held 100% of the fibers stored by the Hooven Company in its warehouse to be subject to state taxation? Nevertheless this Court held that *none* of such fibers was subject to state taxation.

The dissenting opinion in the *Hooven* case.

The error of the Wisconsin court becomes even more manifest when Mr. Justice Black's dissenting opinion in the *Hooven* case is considered. That dissent argued broadly that goods "held for use" by an importer-manufacturer were subject to state taxation. It did not argue that any part of the imported fibers constituted a minimum working inventory and were, therefore, subject to state taxation, because (1) they were "so essential to current manufacturing requirements"; or (2) they were "required to meet immediate current needs"; or (3) they were "required to be kept on hand to meet the current operational needs" of a manufacturing enterprise. Why did not the dissenters take advantage of the apparent reservation in Chief Justice Stone's majority opinion so eagerly seized upon by the Wisconsin courts? The question answers itself. It is because the dissent understood fully the meaning of Chief Justice Stone's remarks to be only that he rejected Ohio's argument with reference to the imported fibers which had not yet been withdrawn from storage in the warehouse and thus had not yet moved from "raw material inventory" to "work in process".

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*The dissenting opinion in the Wisconsin case stated: "I cannot agree with the majority of our court that the form of the rejection of the [Ohio] argument [in the *Hooven* case] changed the established law. The decision in fact, *refused* to change it." *United States Plywood Corp.* v. *City of Algoma*, 2 Wis. 2d 567, 583, 87 N. W. 2d 481, 489 (1958).

If this Court should accept in Case No. 44 the Wisconsin court's interpretation of Chief Justice Stone's remarks, the immunity from state taxation of goods imported for use, as affirmed by this Court in the *Hooven* case, would disappear. If the rule of the *Hooven* case only applies to that portion of an inventory in excess of the needs of the business it would not make sense, and there would not be very many situations to which it could apply. As Mr. Martin stated in his testimony before the Ohio Board of Tax Appeals in the *Hooven* case: "We attempt to run our business with a minimum working inventory, *of course.*"

If the decision of the Wisconsin court were to be sustained, this Court would be faced with the argument that no importer-manufacturer maintains an inventory of raw materials larger than is required for his "current operational needs", and, shortly thereafter, with the argument that importers of goods for sale also have their "current operational needs". The constitutional prohibition against state taxation on imports would soon slide away into a musty corner of constitutional history. But the vigorous defense of the Import-Export Clause of the Constitution in *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946), cannot be so easily forgotten or ignored.

CONCLUSION

For 130 years this Court has not permitted the taxing authorities of the states to erode the prohibition of the Import-Export Clause. Why should iron ores, or veneers, or crude oil, or bauxite, or any other raw materials normally imported and stored prior to their use in manufacturing be subject, prior to such use, to state taxation without the consent of the Congress? There is no logical reason for any such denial. Certainly, the importance of exclusive Federal jurisdiction over taxation of imports is greatest today with respect to raw material imports.

There is no sanction in the Constitution or in any decision of this Court for distinctions between various classes of imports in the application of the Import-Export Clause.

The *Hooven* case holds that the tests are the same in the case of imports held for sale and imports held for use. Neither class is subject to state taxation, so long as the particular imports retain their status as such.

Each in its own way the courts of Ohio and Wisconsin have sought by artful distinctions to chop away at the *Hooven* case. But under *Brown* v. *Maryland* and "all its progeny", the iron ores imported by the steel company in Case No. 9 and stored in its storage yard, and the veneers imported by the plywood company in Case No. 44 and stored in its warehouses have retained their import status. To permit such decisions to stand will, as a practical matter, permit the 48 states to follow their own several taxing policies in a field where exclusive Federal jurisdiction is of great importance.

THE TIME HAS COME FOR THIS COURT ONCE AGAIN TO AFFIRM THE ESTABLISHED RULE.

Respectfully submitted,

BRUCE BROMLEY
ROSWELL MAGILL
Amici Curiae

CRAVATH, SWAINE & MOORE
Of Counsel

APPENDIX A

NEW JERSEY SUPREME COURT

MEXICAN PETROLEUM CORPORATION,
Prosecutor,
v.
THE BOROUGH OF ROOSEVELT, *et al,*
Respondents.
On Certiorari

Argued June Term 1919 before Justices Bergen and Kalisch.

McCARTER & ENGLISH, for prosecutor.

JOHN P. KIRKPATRICK and PETER F. DALY, for respondent.

Per Curiam.

The borough of Roosevelt assessed as the property of the prosecutor, a tug and three barges at a valuation of $130,000 and a quantity of oil in storage at $56,409.96. The prosecutor appealed to the Middlesex county board of taxation which affirmed the assessment, and thereupon this writ was allowed. It is admitted that the tug and barges were improperly assessed, and as to them the assessment should be set aside. The only question in dispute is that relating to the oil. The facts are these. The prosecutor imports the oil from Mexico and then stores it in large retainers which are located in the borough of Roosevelt. After this is done the prosecutor draws the oil and sells it to different persons. The prosecutor's contention is that the oil being an importation, is not liable to taxation, and the

only answer to this is that when the oil is pumped from the vessels in which it is imported to these tanks it then becomes mingled with the mass of other property in this state and therefore is under well settled principles, subject to taxation. It is conceded that if this oil was imported in barrels or other packages, it would not be taxable so long as the packages remained unbroken, or disposed of in such packages. We are unable to see how it can be said that the importation has lost its character simply because it is pumped into retaining tanks in this state, for so long as it remains there it is not mingled with the mass of other property. If this be not so, then the character of the retainer would permit the imposition of taxes in violation of the Federal Constitution.

The cases relating to this subject plainly indicate that something must be done by the importer to change the character of the importation before it becomes subject to taxation, and the fundamental ground upon which taxation is permitted, is that the property has become part of the mass of other property of the state, and this cannot be said occurs when a boat load of oil in bulk is moved from the ship to the warehouse for the purpose of subsequently selling it. The assessment will be set aside with costs.

Case No. 209
Opinion filed October 14, 1919.
ENOCH L. JOHNSON
CLERK